BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

In the Matter of: CORLYNN ELAINE WILSON, Deceased.	)	
MICHAEL TRINDLE, Claimant, v. MPC, LLC, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	)	**IC 04-011377** **FINDINGS OF FACT, CONCLUSION OF LAW, AND ORDER** Filed November 21, 2007

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Douglas Donohue. A hearing was held on January 18, 2007. E. Scott Harmon represented Defendants at the hearing. Neither Claimant nor Claimant's counsel, Kevin Dinius, initially appeared, but the attorney's associate appeared later.

A recommendation and order was issued on March 17, 2007, but was withdrawn upon granting Claimant's motion for reconsideration. The parties were given an opportunity to present briefing on the merits based upon the evidence submitted in the record before the Commission issued a decision.

Claimant filed a brief and affidavit of Kevin Dinius on July 20, 2007. Defendants filed

an objection and motion to strike on July 30, 2007, and Claimant filed a response to Defendants' motion to strike on August 10, 2007. Defendants filed a responsive brief on August 21, 2007. Then Claimant filed a motion to strike on August 30, 2007, which Defendants objected to on September 5, 2007. Claimant did not file a reply brief.

Defendants' Motion to Strike

When Claimant filed his brief on July 20, 2007, he also filed an affidavit of Kevin Dinius in support of Claimant's brief. The affidavit included seven exhibits identified as A through G. Defendants then filed a motion to strike the affidavit of Kevin Dinius pursuant to J.R.P. Rule 3(E) and Rule 10(C). Defendants request the Commission strike the affidavit and such portions of Claimant's brief that refer to or rely upon documents not made part of the record of these proceedings at the hearing. Claimant argues that all of the attached exhibits were in Defendants' possession or were created and produced by Defendants.

Claimant did not serve all parties with exhibits at least 10 days prior to hearing as required by J.R.P. 10(C). Pursuant to Rule 10(F) only such documents which have been admitted as evidence shall be included in the record of the proceedings of the case. The only documents admitted as evidence are Defendants' Exhibits A through E.

The Commission will not consider the exhibits submitted with the affidavit of Kevin Dinius or any facts used in Claimant's brief which are not based upon the facts as found in the admitted Defendants' Exhibits A through E. Defendants' motion to strike is GRANTED.

Claimant's Motion to Strike

Claimant filed a motion to strike on August 30, 2007 arguing that Defendants' motion to strike the affidavit of Kevin Dinius counts as Defendants' response, therefore, Defendants' response brief should be stricken as additional and unauthorized briefing. Defendants assert that

its objection addressed procedural issues, not the merits of the case, and that Claimant's motion to strike is groundless.

The Commission agrees that Defendants motion to strike was a procedural pleading and was not its response brief. Defendants filed a response brief within the briefing schedule set forth by the Commission. Claimant's motion to strike is DENIED.

ISSUE

After due notice and by agreement of the parties the issue is:

Whether Decedent suffered an injury caused by an accident arising out of and in the course of employment.

CONTENTIONS OF THE PARTIES

Claimant contends that Decedent was acting within the course and scope of her employment at the time she was struck by an automobile, because she was on-call that evening and received a page from her Employer. Claimant avers that the "going-and-coming" rule does not bar Claimant's claim because Decedent qualifies for both the dual purpose exception and the special errand exception.

Defendants contend that Claimant has not carried his burden of proving Decedent's death arose out of and in the course of employment. Specially, Defendants argue that Claimant did not demonstrate that any exception to the coming and going rule applies to Decedent's factual situation.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file and
2. Defendants' Exhibits A-E.

After having considered the above evidence and the briefs of the parties, the Commission issues the following findings of fact, conclusion of law, and order.

FINDINGS OF FACT

1. At the time of the accident Decedent was employed by MPC as a Network Operating System Administrator. As an administrator, Decedent was responsible for maintaining the servers assigned to her group. Defendants' Exhibit D.

2. Decedent worked within the MPC facility and also worked from home occasionally. As part of her job, Decedent was required to be on-call approximately every fifth week. If paged while on call, Decedent would need to respond within a certain amount of time. Decedent was required to be in an area where her pager would work, and was expected to be able to respond to the page, and take appropriate action to correct whatever problem had occurred. Defendants' Exhibit D.

3. Most problems with the production servers required the on-call worker to respond with a phone call or some other contact within 15 minutes. For a problem with a server that was only used during the day, the on-call worker was required to have the server up and running before people began work the next day, around six or seven in the morning. Defendants' Exhibit D.

4. On the evening of August 3, 2004 Decedent drove herself and a friend, Charlene Lueddeke, from Nampa to Boise for a softball game. Defendants' Exhibit E. Lueddeke left her vehicle at Decedent's house. Nothing suggests the softball game was associated with, or sponsored by Employer.

5. The softball game began at 9:00 pm and ended sometime between 9:45 and 10:15 pm. During the softball game Decedent received a page and she told Lueddeke that she had a

problem to fix when she got home. Defendants' Exhibit E.

6. Decedent completed her softball game before proceeding home. While driving back to Nampa, Decedent and Lueddeke observed an automobile accident on Interstate 84. Decedent pulled over and exited her vehicle to assist the individuals involved in the accident at approximately 11:00pm. Defendants' Exhibit B. As Decedent walked back to help, another vehicle struck and killed her.

7. Another employee returned to the MPC facility to fix the problem about which Decedent was paged. The problem needed to be fixed before 7:00 am the next morning. Defendants' Exhibit D.

DISCUSSION

The burden of proof in an industrial accident case is on the claimant. *Neufeld v. Browning Ferris Industries*, 109 Idaho 899, 902, 712 P.2d 500, 603 (1985). A claimant must prove not only that he or she was injured, but also that the injury was the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 918 P.2d 1192 (1996).

Idaho follows the "coming and going rule," which generally provides that injuries sustained while traveling to and from work do not arise out of and in the course of employment and are not compensable under the workers' compensation statutes. *Clark v. Daniel Morine Construction Company*, 98 Idaho 114, 559 P.2d 293 (1977). But there are several exceptions to the "coming and going rule," and Claimant argues that Decedent qualifies under two such exceptions, the dual purpose exception and the special errand exception. As a result, Claimant asserts the claim is compensable.

The Dual Purpose Exception

The dual purpose rule, has been described as follows:

> The test in brief is this: If the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own. If, however, the work has had no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped, and would have been canceled upon failure of the private purpose, though the business errand was undone, the travel is then personal, and personal the risk.

In re Christie, 59 Idaho 58, 75-76, 81 P.2d 65, 72 (1938) (citation omitted), *quoted in Reinstein v. McGregor Land and Livestock Co*., 126 Idaho 156, 879 P.2d 1089, (1994).

In the present case, Decedent participated in a softball game and she was returning home after the game when she stopped to assist an automobile accident. The softball game was a strictly personal activity, and Decedent finished the game before leaving to drive home. If Decedent had not received the page from Employer, Decedent would still have finished the game and would have driven home to Nampa with her friend. Moreover, Decedent did not change her route, i.e., heading home after the game instead of to Employer's facility, as a result of receiving the page.

The work, of answering the page, did not create the necessity for travel. Decedent's journey would have been the same even if the business portion in answering the page had been dropped or cancelled. The drive home from the softball game would still have occurred. Decedent does not qualify for application of the dual purpose exception to the coming and going rule.

The Special Errand Exception

The second exception to the "going-and-coming rule" which Claimant argues applies in this case is the special errand rule. The special errand rule is where an employee, although not at her regular place of business, even before or after customary work hours is doing some

special service or errand or the discharge of some duty of or under the direction of her employer, suffers an injury arising en route to or from the place of performance of the work is considered arising out of and in the course of employment. *Dameron v. Yellowstone Trail Grange*, 54 Idaho 646, 34 P.2d 417 (1934), *Trapp v. Sagle Volunteer Fire Dep't*, 122 Idaho 655, 656, 837 P.2d 781, 782 (1992).

The Industrial Commission addressed the special errand rule in *Trapp v. Sagle Volunteer Fire Department*, 122 Idaho 655 (1992). In Trapp, the claimant was a volunteer member of the Sagle Fire Department who had been solicited by the fire department to take an Emergency Medical Technician (EMT) course in order to qualify to give emergency medical treatment. Trapp was injured in an automobile accident while she and five other occupants of the car were traveling to the EMT course.

The Commission, in *Trapp*, pointed out five factors set forth by the Arizona Supreme Court that are useful in this analysis. The five factors are: (1) Did the activity inure to the substantial benefit of the employer? (2) Was the activity engaged in with the permission or at the discretion of the employer? (3) Did the employer knowingly furnish the instrumentalities by which the activity was to be carried out? (4) Could the employee reasonably expect compensation or reimbursement for the activity engaged in? (5) Was the activity primarily for the personal enjoyment of the employee? *Trapp v. Sagle Volunteer Fire Dep't*, 122 Idaho 655, 656, 837 P.2d 781, 782 (1992), *citing Johnson Stewart Mining Co., Inc. v. Industrial Commission*, 133 Ariz. 424, 652 P.2d 163, 166 (1982).

In this case Decedent was returning home from a softball game when she stopped to assist an automobile accident and was struck by another motorist. The activity Decedent participated in during the night in question, the softball game, did not benefit Employer.

Decedent further deviated by stopping on the interstate and exiting her vehicle to assist a traffic accident.

There is no information about whether Employer had knowledge of Decedent's softball game. Employer did not furnish Decedent with any instrumentalities by which Decedent's activity of softball or traveling home took place. Decedent could not have reasonably expected compensation for her time at the softball game or the time spent driving home. Employer did not benefit from Decedent's knowledge of or participation in softball.

Decedent's activities on the night of August 3, 2004, were for her personal enjoyment. Decedent did not leave the softball game early or modify any of her personal plans for the benefit of Employer in response to the page. Decedent does not qualify for application of the special errand exception to the coming and going rule.

Decedent did not suffer an injury caused by an accident arising out of and in the course of employment.

CONCLUSION OF LAW AND ORDER

Based on the foregoing, IT IS HEREBY ORDERED That:

1. Claimant did not prove Decedent suffered an injury caused by an accident arising out of and in the course of employment.

2. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this _21st day of _November_____, 2007.

INDUSTRIAL COMMISSION

__/s/_____
James F. Kile, Chairman

_/s/_____
R.D. Maynard, Commissioner

_/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _21st_ day of __November_____, 2007, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSION OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

KEVIN DINIUS
5700 E FRANKLIN ROAD #200
NAMPA, ID 83687-8402

E SCOTT HARMON
PO BOX 6358
BOISE, ID 83707-6358

__/s/_____